

## THE NEW DIRECTIONS IN ENACTMENT OF FRANCHISING REGULATION IN SERBIA

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**Abstract.** *Together with visible trends of development and promotion of franchising activities in Serbia during the last year, there are numerous attempts in new Serbian legislation policy to regulate franchising agreement de lege ferenda. Besides the process of entering of many foreign franchising systems into Serbian economy, there are contemporary attempts of Serbian legal doctrine and legislative practice to regulate some aspects of the franchising agreement. The most successful was the work of the Commission of Legal Experts formed by the Serbian Government in 2006, which proposed a model for the regulation of franchising agreement as well as leasing and factoring, as presently unknown contracts in Serbian legislation, at the end of 2007. Those rules will be integrated as "New Commercial Contracts" in Serbian Law of Obligation which will be a part of the new Serbian Civil Code which will be enacted by the Commission. The norms, which regulate franchising proposed by the Serbian legislator, are relationship provisions regulating contractual relationships between the franchiser and franchisee. Those norms define the most important obligation aspects of franchising agreement, including its definition and essential elements, content of the contract, contractual specifications, written form, registration requirements, obligation of the parties, restrictions, responsibilities, termination and other relationship norms which are stipulated in order to protect the equivalency of mutual commitments in franchising contracts as well as the position of the franchisee as the economically weaker party. Following the trends of international franchising regulations realized under auspices of the UNIDROIT, a part of the Serbian legal doctrine accepts the modern concept of franchising disclosure regulation, which is prevalent in most countries that already have regulated franchising agreement. Franchiser commitment to provide a franchisee with necessary information before entering into franchising contract will help him make a valid decision on entering into franchiser's concept of business. Enactment of disclosure franchise regulation will be a means to create a secure legal environment between all the parties in franchise agreements in Serbian economy.*

**Key Words:** *Franchising agreement, UNIDROIT Model Law, disclosure.*

## INTRODUCTION

In the context of the development of franchising activities, Serbia is faced with "back to the past".<sup>1</sup> It is a paradox that almost 15 years after the promotion and growth of franchising in Serbia, it was last year for Serbia's economy that was the "franchising year". Two franchising Conferences have been organized by the Serbian Chamber of Commerce (SCC) where the Center for Franchising was established (December 2007) in order to organize and concentrate franchising subjects and activities as well as to precede forthcoming Serbian Franchising Federation. Many foreign franchising systems have entered Serbia during the last year (Springfield, Mango, Re/Max, Curves, IQS, Office 1 Superstore) but a more important fact is the establishing of successful domestic franchising systems such as E Ducan, Com Trade, Belka, AMC, DIS etc. Conscious of the real benefits of franchising, of its potential to act as a stimulus of economic growth and creation of jobs, Serbian Chamber of Commerce has established the Working Group for Franchising Regulation. The "*Guide to International Master Franchise Arrangements*", which is the most comprehensive international franchising document prepared by the experts of UNIDROIT, is going to be published in Serbia. The purpose of translating the Guide into Serbian will be to spread knowledge with a view to providing all those who deal with franchising, whether they be franchise operators, lawyers, judges, arbitrators or scholars, with a tool for better understanding of the possibilities it offers. Those activities correspond with the education seminars "The Franchising – A Step Ahead to Success" organized by the Center for Franchising (SCC) throughout Serbia and Republic of Srpska with the goal of educating prospective franchising operators in Serbia's economy.

Besides the process of franchising promotion and education in Serbia, as well as entering of many of the foreign franchising systems into Serbian economy, there are contemporary attempts of Serbian legal doctrine and legislative practice to regulate some aspects of the franchising agreement. The most successful was the work of the Commission of Legal Experts formed by the Serbian Government in 2006, which proposed a Model for the regulation of franchising agreement as well as leasing and factoring, as presently anonymous contracts in Serbian legislation, at the end of 2007. Those rules will be integrated as "New Commercial Contracts" in Serbian Law of Obligation that will be a part of the new Serbian Civil Code, which will be enacted by the Commission. The norms that regulate franchising proposed by the Serbian legislator are obligation law provisions regulating contractual relationships between the franchiser and franchisee. The Working Group of SCC has initiated enactment franchising disclosure requirements in the Draft of prospective Civil Code. This initiative was well accepted by the members of Serbian Civil Code Commission.

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<sup>1</sup> There were a number of Yugoslav enterprises which had developed their own franchising systems, represented with previous state- and social- owned companies that were in the process of privatization during the 90ies such as Tigar, C-market, Pekabeta, Yumco. Most of those enterprises had developed contractual practices with standard forms franchising agreements. Some of those franchising contracts were lease contracts by their legal nature. See, C-Market standard form franchising agreement in MilenkovicKerkovic, T. "Ugovor o franšizingu", Nis, 1998 pp.195-210

AUTONOMOUS INTERNATIONAL REGULATION AND NATIONAL LEGISLATION  
OF FRANCHISING IN COMPARISON WITH SERBIAN PROSPECTIVE LEGISLATION

The autonomous regulation made by the most important franchising associations International Franchise Association and European Franchise Association provides the pre-contractual duty of disclosure in their Code of Ethics for Franchising. The regulation which is important for the franchising agreement, in spite of the fact that it is out of force from 31<sup>st</sup> May 2000 and limited only to the field of competition law, is the European Union Commission Regulation (fostered after famous "Pronuptia" case) No.4087/88, the most important part of which, in the matter of disclosure, is the definition of franchising which is broadly adopted in the franchising legal literature as well as in legislation process.

The most important legal instruments regarding franchising are: UNIDROIT's (International Institute for the Unification of Private Law) "*Guide to International Master Franchise Arrangements*" (Rome 1988, rev. 2007) containing high –level information of all problems in different stages of conclusion and implementation of franchising agreement not limited to legal issues only, and the chronologically second instrument, but of the greatest importance for the subject of the enactment disclosure law project in Serbia - UNIDROIT "*Model Franchise Disclosure Law*" devoted to the franchiser's duties to disclose material information to franchise, which is together with its Explanatory Report clearly addressed to national legislators, as the "soft law" instrument of the new "lex mercatoria".

In the last 15 years (the period that corresponds with the past activity of UNIDROIT in the area of franchising), an increasing number of countries (especially developing countries and countries with economics in transition) have regulated franchising. Nowadays approximately 30 states have incorporated rules on franchising in domestic regulations.<sup>2</sup> There are different methods that could be used as a guide through the national legislation (type of provisions, type of law to be adopted - disclosure, relationship or registration law, type of legislative technique, etc).<sup>3</sup> The method chosen in this article is the method of legislative technique which regulates franchising in national jurisdiction. The instruments which are used in those regulations vary from the specific franchising law legislations – lex specialis, enactment of the provision related to franchising in national Civil Code, franchising regulation in other different area of law (for example, a law that regulates intellectual property) and a limited number of countries regulated franchising through governmental regulation. The most numerous are the countries that adopted specific franchising regulation. The first law on franchising was adopted in the USA in 1979, where franchising originated, and US federal law on franchising was adopted in 1979 as

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<sup>2</sup> The author spent a 2-month research period at the UNIDROIT Library in Rome working on the project "Enacting Franchising Disclosure Law in Serbia" in 2005. The Report on Research Project has been adopted from the Governing Council of UNIDROIT in May 2005. The opinion and attitudes in this article are author's and do not represent the official opinions of UNIDROIT.

<sup>3</sup> The most useful in that area are the articles: Peters,L."The Draft UNIDROIT Model Franchising Disclosure Law and the Move Towards National Legislation",ULR 2000-4, pp.717-735; The Draft Unidroit Guide to Franchising-How and Why?,ULR1996-4, pp 694-707. as well Annex 3 to Guide to International Master Franchise Arrangements –"Legislation and Regulations relevant to Franchising" also on UNIDROIT web site which is periodically updated

Federal Trade Commission (FTC) Rule on Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures. It was the first law that regulates the information a franchiser is required to supply the prospective franchisee with (so called *franchising disclosure law*) in order to provide it with all the elements necessary to evaluate the franchise it is proposing to acquire. It is the federal law, and FTC Rule applies in all fifty states and is indented to provide a minimum pre-contractual protection of the franchisee. It therefore applies wherever states have not adopted more stringent requirements. This law is still in force although an amended Rule has been adopted and is effective as from July 2007. The North American Securities Administrators Association (NASAA) has adopted a Uniform Offering Circular (UFOC) that indicates 22 types of information that should be furnished to a prospective franchisee. Canada has the longest experience with franchising legislation and the provinces Alberta, Ontario and Prince Edward Island have had franchise specific regulation from 1995. France was the first European state that enacted franchising specific disclosure law in 1989 (Loi Doubin). Specific franchising regulation in form of the law came about also in Brazil 1994, Malaysia 1998, Kazakhstan and Korea in 2002, Italy 2004, Belgium 2006, Sweden 2006. Other countries that regulate franchising enacted the provision on franchising in their Civil Code. After Albania in 1994, this method has been used by Russian Federation 1996, Georgia 1997, Belarus 1998, Lithuania 2000, Kazakhstan 2002, Moldova 2003, and Ukraine 2004. Each mentioned legislation uses the method enacted in Russian Civil Code (Part 2, Articles 1027-1040)<sup>4</sup>, which does not deal with disclosure in any detailed manner, but instead regulates certain aspects of the relationship between the parties. They *inter alia* deal with the form and registration of the contract, sub-concessions, the obligation of the parties and the consequences of the termination of the exclusive right granted in the agreement.

A number of countries have included provisions related to the franchising in the existing or new laws that regulate some aspects of economic life other than franchising (Mexico 1991, Croatia 1994, Spain 1996). Finally, countries as Indonesia and Romania (1997), China (2004) and Vietnam (2006) enacted detailed franchising regulation in the form of Decrees, which regulate legal regime applicable to franchising in a very detailed manner.<sup>5</sup>

There are significant trends in the adopted legislation: a very limited number of countries did not even mention disclosure requirements, but provided very rigid and restricted provisions regulating contractual relationship between franchiser and franchisee (Russia, followed by the Kazakhstan, Lithuania and Belarus); some legislations only mention disclosure without any details but at the same time regulate in a very detailed way questions concerning contract specification, such as obligation and liability of each of the parties or the renewal of the franchising agreement (Malaysia, Albania, China, Romania). A number of countries have registration requirements with the different object to be registered (Spain, Russian Federation) and the main feature of Malaysian and Indonesian regulations is the existence of very stringent, detailed and burdensome provisions on registration whose purpose is not only informational, but the registration requirements start to be spe-

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<sup>4</sup> UNIDROIT Guide on International Master Franchise Arrangements, Rome, rev. 2007, Annex 3, pp. 296.

<sup>5</sup> *Ibidem*, pp. 294-301/.

cific procedures for the approval of the franchise business which, along with the protectionist as well as domestic party highly protective provisions contained in both acts, is very discouraging for franchisers and requires too much effort on their part. For the same reasons, registration requirements have been nullified in some legislations (Canada-Alberta). Most of the franchise laws contain the disclosure requirements that obligate the franchiser to disclose different categories of information, and the amount of detail is different in each national legislation. The longest lists are contained in the U.S. and Australian legislative (their experience with the abuse being the longest), which is in accordance with common law legal technique of providing big number of clauses in order to cover all specific situations – the method of *numerus clausus*, while the civil law countries and those which followed the method of providing more general provisions which will be made concrete within the case law, have a shorter list of information which the franchiser is mandatory to provide a prospective franchisee with. The new Italian franchising legislation represents this civil law method, containing general provisions with the broader definitions of franchising, its varieties, and obligations of the parties as well as the limited number of disclosure requirements. In the German and Austrian Law there is a general duty of information in accordance with general principles of contract law, and despite the fact that there is no specific franchising law in both these countries, the case law is on a very sophisticated level, treating in many cases the consequences of infringements of franchiser's duty to inform the franchisee in pre-contractual period<sup>6</sup>

The Italian experience with the franchising and the new legislation enacted in 2004, together with the commentary in the legal literature on that issue,<sup>7</sup> were a very precious reflection of the fact that the law is a compromise of interests of all subjects involved of franchising, and especially of the role of Franchising Association in the process of law drafting and implementation.

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<sup>6</sup> LG Hanover, 11<sup>th</sup> April 1995-140267/94 and BGH NJW 1987,41,42. In spite of the fact that neither German nor Austrian legislation provide any specific franchising legislation, there has been in the last years some movement towards it. To avoid the problem of unamortized investments of franchisee after the termination of the franchising agreements, Austria has enacted the new §454 in the Austrian Commercial Code (came into force on August 21<sup>st</sup>, 2003) which is applicable to all kinds of vertical agreements including franchising agreements in which the commitment of the investment has been agreed after this provision has come into force. The new provision provides that entrepreneurs have the right to compensation in respect of their investment after the termination of a distribution contract with the binding entrepreneur, according to some conditions provided by this article for investment and for the termination of the contract. More, Speigelfeld, Austria – Compensation for Franchisee's Investment, *International Journal of Franchising Law*, Vol.2, Iss.1, 2004, pp.28. Furthermore, there is the provision in the German HGB art.89(b) regulating the mandatory compensation that has to be paid to a commercial agent for his loss of "goodwill" (after EC Directive on Commercial Agents such compensation has to be paid in all EU member states), and this provision is applied by the German courts by analogy to franchising agreements. Besides, of significant importance for franchising agreements is also the reform of German BGB made in 2002 in the sphere of the breach of contract. In Zimmerman,R., *Breach of Contract and Remedies under the New German Law of Obligations*, in *Centro di studi e ricerche di diritto comparato e straniero*, Roma, 2002.

<sup>7</sup> Frignani, A., Proposed Franchise Bill for Italy and Laws Fostering Franchising (Financial Incentives), in *International Journal of Franchising Law*, Vol.1,Iss.2,2003,pp. 6-14; Peters,L.,Una lege per franchising, *Diritto del Commercio Internazionale*, Aprile-Giugno, 2004,pp.323-335; Frignani,A.Italian Senate Rules on the Regulation of the Franchise, unofficial translation, in *International Journal of Franchising Law*, Vol.2, Iss.3, pp.36-38.

## THE NECESSITY FOR ENACTMENT OF FRANCHISING LAW IN SERBIA

The comparison with other countries' regulations and experiences in franchising business shows that in Serbia the development of franchising in the economic life and the role of franchise associations as the aforementioned Centre for Franchising are on the beginning of their way. Insufficient franchising practice has caused economic subjects in Serbia to lack necessary knowledge as well as experience with the pattern of abusive conducts. Furthermore, the Code of Obligations provides the duty of information of the other contractual party on contract's important facts only with its general norms. Besides, the duty of information provided in Art. 268 seems to be applied in post contractual phase, after the contract is concluded, and it should be difficult to embrace its mandatory rule in the pre-contractual phase of the contract. Also, the sanction that is provided by the mentioned article of Code of Obligations is only in the party's duty to compensate the loss suffered by the uninformed contractual party, without any consequences on the legal destiny of the contract itself. The Serbian experience with the adoption of the Law on Financial Leasing shows that this specific legislation has introduced the concept of leasing and has encouraged potential investors to engage in leasing operation, and the legislation was promotional for this legal instrument. Enacting the franchising disclosure obligations of the franchiser in future Serbian Civil Code will not have mandatory effects on the relationships of the contractual parties, which could be created through registration requirements.

Through the proposed clauses relating to franchising in the future Serbian Civil code, the Commission offered a set of open remarks and questions which need to be answered before the acceptance of any definite solution.

The first question is: does Serbia need franchise law at all? There are different arguments in attempt to try to find an answer and many different arguments for opposite answers. The comparative legislation experiences show that legal creators might wish to have a franchise law without recognizing any impairment to be addressed. The actual lack of experience with franchising might cause unnecessary regulation where the law comes up even before having a significant franchise network to be governed. The enactment of burdensome regulation without prior finding of the harm to be eliminated could prevent the development of franchising instead of promoting it. Even if there are found problems to be solved legally, it is not always appropriate to enact a law specifically regulating franchising arrangements. Many of the problems are best addressed by laws of a more general nature, such as general contract law or competition law. Sometimes, instead of unnecessary regulation, it could be useful to apply existing legal doctrine applicable to franchise agreements in resolving contractual or practical problems.<sup>8</sup>

However, many reasons inspired Serbian Commission to offer clauses *de lege ferenda* which will regulate the so-called new contracts in business law such as franchising agreement, factoring and leasing contracts. The most relevant between numerous arguments of the Commission are: the argument of applicable law which is a weak point of any franchising contract where domestic regulation lacks, as well as the complex nature of franchising contract. This complexity could not be overcome with the application of the law of general nature (general rule of the Law of Obligation, Competition Law etc.) or with

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<sup>8</sup> Kozuka, S. Overview of the Draft Model Law of Unidroit on Franchising, Tokyo Internet Law Journal, 2002/1/12, pp.2

the clauses deriving from other contracts (sale contract, licence contract). There is a very significant reason that prevails in the decision whether franchising regulation is effective. It is the argument of the protection of the economic position of the domestic franchisee, which is traditionally the economically weaker party in the franchising contract. The experiences of many countries which decided to regulate franchising show that existing franchisees were so pervasively exploited that no sensible business person is over-encouraged to enter a franchise relationship. Then, the regulation of franchising even entails that a burden on franchisers will bring benefits to the franchise industry as a whole, including franchisers as well as franchisees which are protected with the obligation norm of the franchising regulation. The role of regulation in this case is the creation of an equilibrium of contractual party interests in the franchising agreement.

Another important reason in favour on franchising regulation in the future Serbia's codification is the reason of applicable law in the franchising agreements with foreign elements. In most of the agreements, the choice of applicable law clauses is at disposal of the party autonomy principle, which practically means that the choice of law will be selected by the franchiser as the economically stronger contractual partner that always imposes its domestic law as the law that will govern the contract. As applicable law could also become the source of unequal status of the contractual parties in franchising contract, it could be the prevalent reason which inspired the legislator to provide domestic norms which will govern franchising contract in Serbia.

All those questions are opened in Serbian legal doctrine and in future legislative activities and in case where the "franchise law" will be found effective, bringing benefits to the franchise industry as a whole, including franchisers as well franchisees, a model of possible regulation is proposed.

#### THE CONTENT OF THE MODEL FOR THE REGULATION OF FRANCHISING CONTRACT IN THE FUTURE SERBIAN CODE CIVIL

What is the content of proposed regulation on franchising contract in Serbian legislation *de lege ferenda*?

The intention of the legislator is to define franchising contract in accordance with the modern notion of franchising which embraces only integrative franchising systems such as business format franchising. The traditional industrial or distributive franchising contracts are no longer in Europe treated as franchising systems but rather as forms of licence and exclusive distribution contracts.

The definition, content and essential elements as well as the rule of mandatory written form of franchising contract are relevant for regulation of franchising in future Serbian codification.

There is also proposed rule on registration of franchising contract in Business Registers Agency, which should not have constitutional but rather evidential effects. A number of countries have registration requirements (Spain, Russian Civil Code, Indonesia, Malaysia...). There are differences between countries as to what must be registered. The author of the article is of the opinion that registration norm should be burdensome for franchiser without any significant effect, because franchising contract does not contain significant propriety law effects as leasing contract, whose registration is already provided in Serbian

positive law. The Working Group of Serbian Chamber of Commerce has proposed to the Codification Commission that, instead of the registration norm, it is more urgent to enact the norms relating to the pre-contractual responsibility of the franchiser to provide the franchisee with the information relevant to make rational decision to enter the franchising system. This initiative, as well its arguments presented by the author of the article, will be considered by the Commission and if accepted will be enacted into the prospective franchising regulation.

Besides notion, elements, form and registration of the franchising contract, the Serbian legislator provided a set of norms which regulate most controversial questions in the life of a franchising contract such as sub-franchise contract (capacity of the franchisee prescribed by the contract to transfer rights and obligations to a third person; connections between master franchise contract and sub-franchise contract; annulment of master contract causes annulment of the sub-franchise contract); rights and duties of the parties in the franchising contract; limitation of the party autonomy (restrictive clauses in the sphere of goods, territory and consumers, post-contract competition clauses). Those clauses included in-term as a post-term covenant against competition to protect against unauthorized use of the franchiser's intellectual property, either during or to some extent following the termination of the franchising agreement.

It is a prescribed responsibility of the franchiser for the demand of the third person in the case of inconformity of goods or services provided by the franchisee. The termination and conditions for the renewal of the franchising contract are prescribed as the rules of minimum protection for the party, as well as termination of the contract in case of liquidation or bankruptcy of the franchiser or the franchisee, as well as in case of the termination of the exclusive rights of the franchiser. Obligation of the loyal competition during and after termination of the contract is provided together with maximum one-year post-contract competition clauses. Obligation of the confidentiality on the side of franchisee during and after termination of the contract is also provided.

The Working Group of the Serbian Chamber of Commerce proposed to prescribe the disclosure obligation of the franchiser to provide franchisee with the set of information before entering the franchising contract. The scope of information depends on the goal of disclosure requirements as well as the relative nature of the norms contained in the future Civil Code. Enacting of disclosure franchising clauses in the future Code could show effect in an increase of common economic and legal understanding of franchising concept.

#### WHAT IS THE SCOPE OF THE PROPOSED REGULATION OF FRANCHISING DISCLOSURE REQUIREMENT IN FUTURE SERBIA'S CIVIL CODE

During the two-month research period at UNIDROIT in Rome during 2005, the author of this article has prepared the Draft Franchising Disclosure Law for Serbia which has been created considering the definitions from UNIDROIT Model Franchise Disclosure Law as well EU Commission Regulation NO 4087/88. This Draft was the inspiration for the proposal of enactment disclosure requirements in the franchising regulation in the prospective Serbian Civil Code defined by Working Group for Franchising Regulation of Serbian Chamber of Commerce.



Furthermore, the proposal also contains language requirements prescribing that the disclosure document as well as the proposed franchise contract must be in a language which is officially used in the prospective franchisee's principal place of business or place of activity, which is not contained in the UNIDROIT Model Law, because this requirement could be of big importance for domestic economic subjects whose foreign language skills are traditionally not well developed, as well as because of the fact that it is the duty of responsible franchiser in international franchising to translate disclosure documents, contract, etc. into the franchisee's mother tongue ( in this case into Serbian). The time period when the disclosure document must be given to the prospective franchisee is prolonged to 30 days (instead of fourteen day period in Model Law), within which period the franchisee could examine the document and obtain expert legal and other types of advice. The number of days within which disclosure document need to be updated is fixed on 30 days, and in the situation when material changes (defined in Art. 3(5)) occur, the obligation of the franchiser to inform the prospective franchisee in writing as soon as possible is stipulated, and disclosure document must be updated 15 days after material changes occur.

The type of the information which the franchiser must obtain are not so extensive as contained in the UNIDROIT Model Law and in the author's Draft, but it should contain information on the franchiser<sup>9</sup>, on the franchiser's business system<sup>10</sup>, list of other franchisees together with the data on changes in the number of the franchisees in last three years<sup>11</sup>, data on status of franchiser's trade marks and other intellectual property rights<sup>12</sup>,

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<sup>9</sup> a) registered legal name, legal form and registered place of business of the franchiser, and the address of the principal place of the business of the franchiser;

b) trade mark, registered trade name, business name or similar name, under which the franchiser carries or intends to carry on business on the territory of the Republic of Serbia;

c) the address of the principal place of business in the Republic of Serbia;

d) the amount of the registered capital of the franchiser and the amount of the registered capital of the affiliate of the franchiser;

e) a description and summary of the activities and the operations characterising the franchise to be operated by the prospective franchisee.

f) the description of the business experience of the franchiser and its affiliates granting franchises under the same trade name, including mandatory information of the length of time which franchiser has run a business of the type to be operated by the prospective franchisee, as well as the information on the length of time during franchiser has granted franchises for the same type of business as that to be operated by the prospective franchisee.

g) information of any criminal convictions or any finding liability in a civil action or arbitration procedure involving franchise or other businesses relating to fraud, misrepresentations or similar act of the franchiser, affiliate of the franchiser or any of senior manager or director of the franchiser for the previous five years, together with the providing of the summary of any court or arbitral decision taken in mentioned proceedings.

h) information on any bankruptcy, insolvency, reorganizations and the comparable proceeding involving the franchiser and its affiliates for the previous five years and the court citation thereof.

<sup>10</sup> i) the information on the franchisee in the business system, including information on the total number of franchisees and company-owned outlets of the franchiser and of its affiliates of the franchiser granting franchises under substantially the same trade name, and information on the trade and/or personal names, business addresses and business phone numbers of the franchisees which outlets are located nearest to the proposed outlet of the prospective franchisee in the Republic of Serbia, then in the contiguous States, or , if there are no such outlets, outlets in the State of franchiser but in any event of not more than 15 franchisee.

<sup>11</sup> k) information (trade and/or personal name, business place, business phone number) about the franchisees of the franchiser and about franchisee of affiliates of the franchiser that have left the business system during the three years before the one during which the franchisee agreement is entered into, with an indication of the

financial matters<sup>13</sup>. Moreover, the disclosure document must contain the most important information if it is not already contained in the proposed franchising contract attached. If the said information is contained in the proposed franchising contract, the disclosure document will contain reference to the relevant section of the franchise agreement, and if that information is not contained in the proposed franchising agreement, that fact shall be clearly stated in the disclosure document<sup>14</sup>. The required information which the disclosure documents shall contain depends on the fact whether it is already included in the proposed franchising contract, there are some additions in some of the paragraphs, such as the description of the training program, the personality of the trainer, the duration, expanses as well as the clear signification of the fact who bears the expenses of the trainings programmes.

The legal remedy for the omission of the franchiser to obtain the disclosure document should be the right of the franchisee to ask the court for the annulment of the concluded contract under Article 112 of the Code of Obligations and /or to claim from the franchiser the damages suffered because of the omission of the franchiser (disclosure document or

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reasons for the termination of the contractual relationship (contracts terminated or not renewed by the franchisee, contracts terminated or not renewed by the franchiser or by the affiliate of the franchiser, contracts terminated due to the bankruptcy or insolvency, voluntarily terminated or not renewed contracts);

<sup>12</sup> l) information on the status of the franchiser's intellectual property rights on the territory of Republic of Serbia, which are to be licensed to the franchisee as the part of the franchise ( trade marks, patents, copyrights, utility models, design, software etc.) with the mandatory information on the registration or on the application for registration, the trade or/and personal name of the owner of the intellectual property rights or the trade or/and personal name of the applicant, the date on which the registration of the intellectual property rights licensed expires, and the limitation of that intellectual property rights form the third parties, and litigation or other legal proceedings, if any, which could have a material effect on the prospective franchisee's legal right, exclusive or non-exclusive, to use the intellectual property under proposed franchise contract;

<sup>13</sup> n) Financial matters, including

- an estimate of the amount of the prospective franchisee's total initial investment;
- financing offered or arranged by the franchiser, if any;
- the financial statements which show financial position of the franchiser verified from the legally empowered and independent reviser, including balance sheets, and balance of profit and losses for the previous three year, or from the beginning of the franchisers business activity (*it is indispensable that those provisions be examined by the financial experts*);

<sup>14</sup> a) the term and conditions of the renewal of the franchise contract;

b) a description of the initial and on-going training programs of the potential franchiser and/or its employees, regarding to the trainer and of the subject who bears the expenses of the training program, and the duration and the expenses of the training program;

c) the nature and extent of exclusive rights if there are to be granted to the prospective franchisee relating to the territory and /or customers, and the information of any reservation by the franchiser of the right to use or to license to use of the trademarks covered by the franchising contract, and if the franchiser reserves the right to sell or distribute the goods and services under the same or other trademarks which will be transferred to the prospective franchisee;

d) conditions under which the franchiser could terminate the franchising contract and effects of such termination;

e) conditions under which the franchisee could terminate the franchising contract and effects of such termination;

f) the limitations which, if any, are imposed on the franchisee, in relation to territory and/or to customers;

g) non-competition clauses imposed during and /or after termination of the franchising contract;

h) the initial franchisee fee ( in the manner of the system entrance fee) and the royalty, and other fees and payments;

i) the conditions for the assignment of other transfer of the franchise to the third parties;

j) any choice of law and choice of forum clauses and the method of dispute resolutions.

notice on material change are not delivered at all, contain misrepresentations, or fraud, or make an omission of material fact).

#### CONCLUSION

The comparative analyses of the provisions of franchise laws adopted in recent period lead to the observation that, with the exception of the Russian Civil Code (and legislations which are inspired by Russian legislation), all franchise laws deal with disclosure requirement in different ways and to different extents. Other norms are inspired by domestic conditions and with the intent of the legislator to protect domestic franchisee and domestic products or industry.

The intent of Serbian legislators to promote franchising through franchising law contained in prospective Civil Code is inspired by the idea of the protection of interests of the parties in the franchising contract relationship. Obligation norms, which regulate contractual aspects of franchising contract together with disclosure requirements that protect parties in the pre-contractual stage of the relationship, will be an important method in the process of creating legal security as well as a healthy commercial law environment for the future development of franchising in Serbia.

## NOVI PRAVCI U REGULISANJU UGOVORA O FRANŠIZINGU U SRBIJI

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*Uparedo sa vidljivim porastom franšiznog poslovanja u Srbiji u poslednje dve godine, kao i zajedno sa promotivnim i edukativnim aktivnostima novoosnovanog Centra za franšizing u okviru PKS i srpska legislativa se okreće ovom ugovoru autonomnog trgovinskog prava u težnji da uredi obligaciono-pravna dejstva tog po mnogo čemu specifičnog pravnog posla. Bilo je tokom poslednjih godina više pokušaja da se uredi oblast ugovora o franšizingu a najveće rezultate imala je Komisija za izradu Građanskog zakonika Republike Srbije koju je 2006. god. osnovala srpska Vlada. Model regulative ugovora o franšizingu ovo je telo predložilo i ugradilo u deo koji reguliše tzv. "nove trgovinske ugovore". Norme koje srpski legislator predlaže treba da urede relativno-pravni odnos između subjekata franšizing poslovnog odnosa, a pre svega bitne elemente ugovora, sadržinu ugovora, pismenu formu, obavezu registracije, obaveze ugovornih strana, pitanja odgovornosti, prestanka ugovornog odnosa kao i druga pitanja koja treba da očuvaju osetljivu ravnotežu uzajamnih davanja ali i da obezbede zaštitu ekonomski inferiornijeg ugovornog partnera. Regulatorna ugovora o franšizingu koja je ostvarena na međunarodnom planu (UNIDROIT) kao i u uporednom zakonodavstvu nosi primetan trend regulative obaveze predugovornog obaveštavanja korisnika franšizinga o svim bitnim aspektima budućeg pravnog posla kako bi korisnik franšizinga bio u stanju da donese utemeljenu odluku o ulasku sistem franšiznog poslovanja davaoca franšizinga. Stoga se autor u radu zalaže za izmenu pravila o potrebi registracije ugovora o franšizingu a za unošenje de lege ferenda pravila o obavezi davaoca da određeni period pre ulaska u ugovorni odnos korisniku obezbedi dokument koji sadrži obaveštenja sa najznačajnijim aspektima budućeg ugovornog odnosa.*

**Ključne reči:** ugovor o franšizingu, Model Zakon UNIDROIT, obaveza obaveštavanja